No. 80-569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 1830 AND LOCAL 1833,
GENERAL LONGSHORE WORKERS,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

v.

ALTON J. BAILEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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PETITIONERS' REPLY MEMORANDUM

C. PAUL BARKER
BARKER, BOUDREAUX, LAMY, GARDNER and FOLEY
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112

GEORGE KAUFMANN
(Counsel of record)
2101 L Street, N.W.
10th Floor
Washington, D.C. 20037
(202) 296-1294

Attorneys for Petitioners

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondent Bailey is plainly unable to show that the Court of Appeals' decision to compel the merger of petitioner unions is consistent with Title VII of the Civil Rights Act, the basic principles established by this Court for formulating equitable decrees, or the proper allocation of functions between district courts and courts of appeals in exercising this responsibility. (See Question Presented, Pet. i)[1] Originally, he sought to conceal this inability by filing no Brief in Opposition at all. When

[1] "Pet." refers to Petition for Certiorari herein; "Br. Opp." refers to Respondent's Brief in Opposition. "Respondent" refers to plaintiff Bailey unless otherwise specifically indicated.

that tactic failed, because the Court requested that a response be filed, respondent resorted to a different device: He has submitted a Brief in Opposition which refuses to address the question presented by the Petition; rather, beginning with his own statement of Questions Presented through all that follows, the Brief in Opposition is confined to the correctness of the Court of Appeals' adherence to its original decision notwithstanding this Court's intervening decision in *East Texas Motor Freight Systhem* v. *Rodriguez*, 431 U.S. 395. That issue was decided in the Court of Appeals' second decision in this case but is not sought to be reviewed here.[2] Accordingly, the precedential and practical grounds for review stated in the Petition and in the employer respondents' supporting memorandum remain unanswered; considering that respondent has failed to do so despite two opportunities, they can fairly be regarded an unanswerable. Under the circumstances we would file no reply at all, were it not that three propositions asserted by respondent, almost incidentally, in his otherwise irrelevant discourse, call for brief comment.

I. Respondent refers to the locals throughout as being "segregated". We therefore emphasize that it was not

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[2] As the Court observed in *Mercer* v. *Theriot*, 377 U.S. 152, 153-154:

> We now "consider all of the substantial federal questions determined in the earlier stages of the litigation . . . ," *Reece* v. *Georgia*, 350 U.S. 85, 87, for it is settled that we may consider questions raised on the first appeal, as well as "those that were before the Court of Appeals upon the second appeal." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257. *Cf. Urie* v. *Thompson*, 337 U. S. 163, 171-173; *Messenger* v. *Anderson*, 225 U. S. 436, 444.

See also, *e.g.*, *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 365, 366, n. 1.

Nevertheless, and despite the clear statement of the issues presented in the Petition and the grounds for their review, respondent seeks to have this Court treat the Petition as if it raised only the issues decided by the Court of Appeals on the *second* appeal.

found and the record does not show that the respondent or any person, black or white, was excluded from joining or remaining in either of the locals on the basis of race. (Pet., pp. 4, n.2; 7; 10, n.5) only in the special sense that black members, including plaintiffs, have voluntarily chosen to remain members of Local 1833. As acknowledged at Br. Opp. 10, the court below did not decide that segregated locals are *per se* illegal under Title VII.

II. Respondent cites two lower court cases in which it has been held that segregated locals are illegal *per se* (Br. Opp. 10, n.6). We think that those decisions are erroneous because they render superfluous everything in § 703(c)(2) which begins with the phrase "in any way which". (See Pet. 2-3 quoting the entire provision.) In any event, whatever may be the merit of those decisions, they are plainly beside the point, since the Court below expressly eschewed reliance on that theory. Indeed that court "expressly recognizes the necessity to demonstrate an actual discriminatory effect." (Pet. 23a). But the Fifth Circuit has accomplished the same end by a *per se* rule that locals which are separately organized and contain respectively black and white members violate § 703(c)(2) because of a potential "tendency" to cause hiring discrimination, notwithstanding years of experience in which there has been none. The Fifth Circuit reached this result herein by adopting its prior findings of two prior cases in this industry in which findings of actual discrimination had been made, of course on different records. (App. 20a-24a; see Memorandum for Employer Respondent's in Support of Petition, pp. 4-5) And it has done so again in another ILA case in which a petition for certiorari was filed after the present petition and which, in part, raises the same equitable issues presented herein.[3] The Fifth

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[3] *Local 1576, International Longshoremen's Association, AFL-CIO* v. *Equal Opportunity Employment Commission, et al.*, No. 80-1147, filed Jan. 9, 1981. See particularly *id.* at pp. 21-26.

Circuit's course of decision has the effect of reading out of § 703(c)(2) the requirement of a tendency to discrimination not only because the Court apparently makes such a finding automatically despite all prior experience (see Pet. 6), but because it thereupon directs merging the locals without considering (or preferably permitting the District Court to consider) whether some less drastic means is available for eliminating even that tendency. In that connection, the employer respondents' memorandum is worthy of special attention, for given the practical consequences adverted to therein (pp. 3-5) it is plain that the decision below conflicts not only with *Albemarle*, *Manhart* and the other equitable decisions of this Court cited in that memorandum and in the Petition, but also with a decision of the Second Circuit which has clearly understood and correctly applied those equitable principles:

> When a District Court finds that discriminatory practices on the part of a union or an employer have prejudiced minority workers, it should frame its relief with an eye toward remedying the wrong, *see generally Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421, and should interfere with the defendant's operations no more than is necessary to accomplish this result. (Citations omitted.) This means that it should not proceed to issue a broad sweeping remedial order without some evidence before it as to the effect which the order will have. *Cf. Ostapowicz* v. *Johnson Bronze Co.*, 541 F.2d 394, 401-02 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).[4]

III. In his strenuous but superfluous effort to distinguish the present case from *Rodriguez*, respondent broadly asserts his individual standing to challenge the defendants' allegedly illegal practices. It is therefore necessary to delineate more precisely just what practices

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[4] *E.E.O.C.* v. *Local 14, Intern. Union of Op. Eng.*, 554 F.2d 251, 256 (C.A. 2).

he may challenge, particularly as this bears on the propriety of the relief which he may rightfully obtain. After all, the principal reason for denying him status as class representative was that his views were opposed by the vast majority of the black members whom he claimed to represent and whose rights are adversely affected by the challenged merger order. (Pet. 13a-15; 33a; 39-39a)

It is clear that as a member of one of the affected locals petitioner would have standing to contend that the maintenance of separate black and white locals is illegal. But as already noted, the case was not decided below on this basis; moreover, it appears that in fact respondent would have been free to join Local 1833 at any time and that he would therefore be seeking relief for which he does not need the benefit of a court decree. For both reasons, respondent's conceded standing to contend that separate locals may not lawfully be maintained would have nothing to do with the case even if that position had merit.

Second, respondent plainly had standing to contend that he himself had been discriminated against in hire on the basis of his race. However, that claim was decided against him on the merits by the courts below. (Pet. 18a-20a; 33a-34a)

Third, respondent also contends—and this was the sole theory on which he obtained relief from the Court of Appeals—that the combination of separate locals and what has been referred to as the "50/50 hiring rule" (but see Pet. 5-6, n.3; 34a) has a "tendency" to deprive him of potential hiring opportunities in the future. Under the presently existing precedents of this Court it is a close question whether such a claim of theoretical possible future injury is sufficient to give rise to standing sufficient to satisfy either Article III or the Court's prudential considerations. See, *e.g.*, *Sierra Club* v. *Morton*, 405 U.S. 727; *Warth* v. *Seldin*, 422 U.S. 490; *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 260-264. But

the existing precedents in this Court to clearly require that the lower courts consider the countervailing equities, particularly in cases under Title VII that it has seemed to be inconsistent with the Court's admonitions of specificity and brevity in Petitions for Certiorari to raise separately the closer issue that petitioner lacks standing to obtain (as distinguished from the propriety of the Court of Apepals' granting) the sweeping relief which that Court mandated and of which review is sought herein.[5]

* * * * *

In sum, for foregoing reasons, as well as those stated in the Petition for Writ of Certiorari, and the Memorandum of Employer Respondents in support of the Petition, the Petition should be granted.

Respectfully submitted,

C. PAUL BARKER
BARKER, BOUDREAUX, LAMY,
GARDNER and FOLEY
1400 Richards Building
837 Gravier Street
New Orleans, Louisiana 70112

GEORGE KAUFMANN
(Counsel of record)
2101 L Street, N.W.
10th Floor
Washington, D.C. 20037
(202) 296-1294

Attorneys for Petitioners

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[5] But see Pet. 16-17, n.8, where we observe that denial of class representative status to respondent militates against the granting of relief which impacts adversely on the other black members of Local 1830 whom respondent unsuccessfully sought to represent.